In a few jurisdictions a recovery is allowed for the beneficiaries free from negligence and is denied to those who are negligent.[14] This is the logical solution without taking unwarranted liberties with the statutes, which are practically similar. The result is that when the parent brings the action as administrator he will be denied any recovery because of his contributory negligence if he is the sole beneficiary.[15] Also, when the administrator sues for the benefit of the estate which goes to several beneficiaries, if any of the latter have been contributorily negligent, the recovery will be reduced in proportion to their shares.[16] Thus the one is prevented from profiting by his own wrong and the other beneficiaries receive their compensation as intended by the legislature.

CONTROL BY MANDAMUS OVER JURISDICTIONAL MISTAKE OF LAW. —Where appellate jurisdiction of a cause arising from a justice's or other inferior court is lodged in an intermediate court, and such court erroneously declines to take jurisdiction, or erroneously dismisses an appeal duly taken, the overwhelming weight of modern authority holds that such a mistake of law on the question of jurisdiction, is not final and that the intermediate court may be compelled by mandamus, to proceed with the trial of the case, whenever there is no other adequate remedy by appeal or writ of error.[1] The court has no *right* to dismiss the case and thus deny the appellant his "day in Court;" it is within the *power* of the court so to dismiss the appeal, but such a mistake of law or matter of practice purely preliminary to the real points at issue, will be corrected by mandamus from the highest court. Nor is this a violation of the principle that mandamus does not lie to correct or set aside an exercise of the judicial discretion. The duty to assume jurisdiction is purely ministerial, and where there is no other remedy mandamus lies, not to direct the decision of the court on matters going to the merits, but

---

[14] Horton *v.* Forest City Tel. Co., 141 N. C. 455, 54 S. E. 299; Wolf *v.* Lake Erie Ry. Co., *supra.*

[15] Bamberger *v.* Ry. Co., *supra.*

[16] Wolf *v.* Lake Erie Ry., *supra.*

[1] People *v.* Foster, 40 Misc. 19, 81 N. Y. Supp. 212; Kelsey *v.* Church, 112 N. Y. App. Div. 408, 98 N. Y. Supp. 535; Cowan *v.* Fulton, 23 Gratt. (Va.) 579; Richardson *v.* Farrar, 88 Va. 760, 15 S. E. 117; White *v.* Holt, 20 W. Va. 792; Wheeling Bridge Ry. Co. *v.* Paull, 39 W. Va. 142, 19 S. E. 551; Hollon Parker, Petitioner, 133 U. S. 221; In re Connoway, Receiver, 178 U. S. 421, 20 Sup. Ct. 951; In re Turner, 5 Ohio 542; State *v.* McCarty, 52 Ohio St. 362, 39 N. E. 1041; State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044; Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924; Cox *v.* Hightower, 19 Tex. Civ. App. 536, 47 S. W. 1048; Castello *v.* Circuit Court, 28 Mo. 259; Brown *v.* Mining Co., 105 Mich. 653, 63 N. W. 1000; Taylor *v.* Montcalm Circuit Judge, 122 Mich. 692, 81 N. W. 965; State *v.* Court, 13 Mont. 370, 34 Pac. 298; State *v.* District Court, 38 Mont. 166, 99 Pac. 291; Griffin *v.* Howell, 38 Utah 357, 113 Pac. 326; Golden Gate Tile Co. *v.* Superior Court, 159 Cal. 474, 114 Pac. 978; Floyd *v.* District Court (Nev.), 135 Pac. 922.

merely to compel the court to exercise its judicial discretion where a proper case is presented.

Jurisdiction is always a matter of law, it may depend on a set of facts but it is the law which flows from those facts which establishes the jurisdiction. The provisions of the constitution conferring jurisdiction are mandatory and require a hearing on the merits of any case properly before the court; the judge below must determine for himself whether or not facts brought to his official knowledge are such as to require him to hear the case, but his decision on the question of jurisdiction is not final. For if the refusal of the court to take jurisdiction amounted in itself to an exercise of the judicial discretion, it would be well-nigh impossible to compel action by a judicial officer, even where the right to a hearing on the merits was most obvious. In no case would such a holding be more of a hardship than in causes arising from an inferior court where final appellate jurisdiction is vested in the intermediate court, and no such attempted abdication of jurisdiction is, by the better view, permitted. The aim of all law is to provide for the determination of causes on their merits and a judicial officer cannot render nugatory the constitutional provision conferring jurisdiction by merely alleging that he determined judicially that no case was presented to him which called for the discharge of his (ministerial) duty. Undoubtedly it is settled law that where a court exceeds its jurisdiction its proceedings are a nullity and will be set aside. In like manner no sufficient reason can be adduced to defend the view that when a court assumes that it has not jurisdiction, when as a matter of law it has, that its decision cannot be disturbed. The true rule is that a court is as powerless to divest itself of a jurisdiction that it has, as it is to vest itself with a jurisdiction that it has not.

A few cases have held that while mandamus lies to compel action by a judicial officer who from caprice or other unreasonable motive refuses to proceed with the trial of the cause,[2] it does not lie to correct a mistake of law on the question of jurisdiction.[3] In these cases

---

[2] State *v.* Lazarus, 37 La. Ann. 610.

[3] People *v.* Judges of Dutchess C. P., 20 Wend. (N. Y.), 658, but see Kelsey *v.* Church, *supra;* People *v.* Garnett, 130 Ill. 340, 23 N. E. 331, based upon overruled decisions; Ewing *v.* Cohen, 63 Tex. 482, but this case would seem to be overruled by Cox *v.* Hightower, *supra;* and it is difficult to see why it should be there referred to as "a clear case where the writ (mandamus) would not lie." People *v.* Weston, 28 Cal. 640; Lewis *v.* Barclay, 35 Cal. 213. The general principle of these cases that a jurisdictional mistake of law is final was reversed in a line of California cases, *q. v.* Levy *v.* Superior Court, 66 Cal. 292, 5 Pac. 353; Hall *v.* Superior Court, 68 Cal. 24, 8 Pac. 509; Carlson *v.* Superior Court, 70 Cal. 628, 11 Pac. 788.

Buckley *v.* Superior Court, 96 Cal. 119, 31 Pac. 8, a 5 to 2 decision; see strong dissenting opinion by Patterson, J., in which Beatty, C. J., concurred. The Buckley case was overruled in Golden Gate Tile Co. *v* Superior Court, *supra,* where mandamus was held to be the appropriate remedy.

Crooks *v.* District Court, 21 Utah 98, 59 Pac. 529, decided on the authority of the Buckley case, *supra;* see also strong dissenting opinion

a decision on this purely preliminary question is held to be an exercise of the judicial discretion. It is said that to entertain the writ of mandamus would amount to a complete review of the case below and an abuse of the discretion of the intermediate court, but this can hardly be true since the question before the highest court involves merely the sufficiency or insufficiency under the constitution and statutes of the appeal as taken. A further reason for refusing to issue mandamus is found, according to these cases, in the desire on the part of the highest court to keep from being overwhelmed by applications for the writ.

THE CONSTRUCTION OF THE TERM INSOLVENT AS USED IN § 3a(4) OF THE BANKRUPTCY ACT.—A general assignment for the benefit of creditors constitutes in itself an act of bankruptcy.[1] The solvency or insolvency of the assignor at the time the assignment was executed or at the time the petition was filed is immaterial.[2] Prior to the amendment of 1903 this was the only act of bankruptcy set out by § 3a(4). It was also held that the fact that a receiver or trustee had been put in charge of a debtor's property did not constitute an assignment for the benefit of creditors and therefore was not an act of bankruptcy.[3] In view of these decisions the practice grew up of having receivers or trustees appointed for insolvent estates, instead of making general assignments, and thus evading the provision of § 3a(4) of the act. But in 1903 an amendment was added to this section to provide for just such cases and to give the creditors an opportunity to have the insolvent estate of the debtor administered under the bankruptcy act. This amendment provided that a person shall be guilty of an act of bankruptcy if "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

It is evident from the language of the statute that the fact that a receiver or trustee has been applied for or put in charge of the debtor's property is not in itself an act of bankruptcy. Whether or not he was insolvent at the time of his application for a receiver, whether or not a receiver was put in charge because of insolvency, are the essential considerations.[4] And whether the debtor's insol-

---

by Baskin, J. Treadway *v.* Wright, 4 Nev. 119; Andrews *v.* Cook, 28 Nev. 265, 81 Pac. 303. This latter case expressly approves the Buckley case, *supra,* but both of these Nevada cases are expressly overruled in the recent case of Floyd *v.* District Court, *supra.*

[1] Bankr. Act, § 3a(4); Clark *v.* Mfg. & Enamel Co., 101 Fed. 962, 4 Am. B. R. 351.

[2] West Co. *v.* Lea, 174 U. S. 590; Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 2 Am. B. R. 383.

[3] In re Empire Metallic Bedstead Co., 98 Fed. 981, 3 Am. B. R. 575; Vaccaro *v.* Security Bank Co., 103 Fed. 436, 4 Am. B. R. 474.

[4] Blue Mt. Iron & Steel Co. *v.* Portner, 131 Fed. 57, 12 Am. B. R. 559; Hooks *v.* Aldridge, 145 Fed. 865, 16 Am. B. R. 664.